APPEAL NO. 032932
FILED DECEMBER 22, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on September 30, 2003. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease as of _____; that the respondent (self-insured) timely contested compensability of the claimant's alleged injury; and that the claimant did not have disability.

The claimant appeals and in addition to appealing the disputed issues on the merits, attacks the hearing officer alleging "malice," "malfeasance," and "willful misconduct," etc. In addition, the claimant asserts error by the hearing officer because he failed to advise the claimant about the ombudsman program. The self-insured responds, urging affirmance.

DECISION

Affirmed.

The claimant was a reading specialist teacher for about 23 years and during the time period at issue (the parties agreed that the date of injury was _____), the claimant was assigned to one of the self-insured's high schools. The claimant testified that her classroom was in the "basement" adjacent to what is referred to as a "crawl space." The claimant contends that exposure to lime, lime dust, molds, "biocides," silica, and sewage and other airborne toxins caused a number of maladies including "vocal cord dysfunction, chronic sinusitis, and bronchitis secondary to the toxic exposure, along with weight loss." Among the diagnoses the claimant has been diagnosed with "allergic rhinitis, conjunctivitis, dyspnea and respiratory abnormality, palpitations, polydipsia, backache, and abnormal loss of weight." The claimant has been seen and examined by no fewer than 14 physicians. The claimant has had numerous testing to include pulmonary function testing, CT scans, skin testing, barium swallow testing, and others (*see* the Self-insured's Exhibit No. 3 for some 25 different testing reports). Four physicians testified at the CCH (two for the claimant and two for the self-insured). Both sides submit various reports, testimony, and case citations to support their respective arguments. The hearing officer's Statement of the Evidence summarizes some of the evidence and gives the rationale for his decision. Obviously there was an abundance of conflicting medical evidence. The hearing officer as the trier of fact is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The claimant had the burden to prove that she was injured in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Since this case concerns a claim of an occupational disease, the claimant had to establish a causal connection between the disease and her employment by reasonable medical probability, and reasonable medical probability is determined by considering the substance of the expert's

testimony. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980). *See* Texas Workers' Compensation Commission Appeal No. 980718, decided May 27, 1998, for a discussion of proving causation in a toxic inhalation case. With conflicting medical evidence and the claimant's burden of proving causation, the hearing officer was charged with the responsibility of resolving the conflicts and inconsistencies in the evidence and deciding what facts the evidence had established. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer was acting within his province as the fact finder in resolving the conflicts and inconsistencies in the evidence against the claimant.

Regarding the carrier waiver issue, the parties appear to agree that the self-insured received its first written notice of the claimed injury on December 20, 2001. In evidence is a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated December 21, 2001, with box 1 marked indicating certification by the self-insured that it would pay benefits as they accrued. In the lower right portion is a Texas Workers' Compensation Commission stamp dated December 21, 2001, indicating receipt of the TWCC-21. The hearing officer found that the self-insured had not waived the right to contest compensability pursuant to Sections 409.021 and 409.022. On appeal, the claimant attacks this finding on the basis that the self-insured had not filed the TWCC-21 but that a third party administrator (TPA) had filed the form "but the TPA is not the 'Carrier' or 'Self-Insured.'" We reject that argument in that the self-insured is an organization which has obviously retained counsel and the TPA to act on its behalf.

In that the claimant has not sustained a compensable injury, the claimant cannot, by definition in Section 401.011(16), have disability.

Regarding the claimant's allegations on impropriety by the hearing officer, we have carefully reviewed the record of the proceedings and find absolutely no merit in the claimant's allegations. In fact, the hearing officer made some rulings favorable to the claimant and on occasion admonished the carrier's counsel. Unfortunately, the issue of timely contest of compensability was poorly worded and should have been couched in terms of Sections 409.021 and 409.022 rather than "according to the Texas Supreme Court." Notwithstanding, our review of the record does not indicate that the claimant was misled and presented pertinent evidence on that point. Also, rather unfortunately, the hearing officer did not explain the ombudsman program to the claimant on the record. However, our review of the record indicates that the claimant was ably assisted in the presentation of her case by the ombudsman and no objection was raised by the claimant that she did not understand what was going on or what her rights were. Further, the Appeals Panel has many times commented on the legal truism that ignorance of the law does not excuse noncompliance with it. Texas Workers' Compensation Commission Appeal No. 980625, decided May 6, 1998, and Texas Workers' Compensation Commission Appeal No. 012804, decided January 3, 2002. This is equally true of the ombudsman program codified in Sections 409.041 and 409.042.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are supported by the evidence and are not incorrect as a matter of law and not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

BG
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Edward Vilano
Appeals Judge